

Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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Federal Communications Commission
Division of Licensing

In re:

Request of Cellular Communications of
Puerto Rico, Inc. to Hold an Auction
To License Cellular RSA No. 727A,
Ceiba, Puerto Rico

RM-8897

To: The Commission

REPLY COMMENTS OF CELLULAR
COMMUNICATIONS OF PUERTO RICO, INC.

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December 10, 1996

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**REPLY COMMENTS OF CELLULAR
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Cellular Communications of Puerto Rico, Inc. ("CCPR"), by its attorneys, hereby submits the following reply comments in support of its petition requesting that the Commission use an auction to license cellular rural service area ("RSA") No. 727A, Ceiba, Puerto Rico.^{1/}

INTRODUCTION AND SUMMARY

Eight years ago the Commission accepted nearly 500 applications for a cellular license to serve Ceiba, Puerto Rico. In accordance with the rules it then had in place, the Commission held a lottery and a winner was chosen. After years of litigation, however, the winner of the Ceiba authorization was disqualified for engaging in anticompetitive lottery behavior and the Commission was faced with choosing another operator. This same scenario was repeated numerous times across the United States.

^{1/} Petition for Declaratory Ruling Or, In the Alternative, For Rulemaking, CCPR, September 9, 1996 ("Petition").

In 1993, Congress told the Commission that it was fed up with lotteries. It noted that random selection engendered rampant speculation, undermined the integrity of FCC's processes, and often resulted in the licensing of unqualified and unmotivated entities. In place of this process, Congress mandated the use of competitive bidding, recognizing that allowing the party that valued the license the most to purchase it would promote the rapid deployment of technology and services, encourage efficiency, and recover a portion of the value of the spectrum for the public. Since that time, the Commission has demonstrated that, through the use of auctions, it is capable of distributing licenses quickly and equitably.

A few of the pending lottery applicants^{2/} have come to believe that the mere act of filing an application has endowed them with the right to participate in a re-lottery for Ceiba and other RSA authorizations. Accordingly, they have vociferously attacked CCPR's Petition on both legal and equitable grounds. These attacks should be accepted for exactly what they are: the complaints of frustrated gamblers that the United States government no longer wants to fund their "get rich quick" schemes.

Contrary to the assertions of the Lottery Proponents, the Commission has full statutory authority to conduct an auction of these RSA licenses. As noted above, Congress mandated competitive bidding for most radio spectrum and merely provided the Commission with discretion to hold lotteries when applications were already pending. Somehow the Lottery Proponents have construed this permissive provision to mean that the Commission

^{2/} Applicants Against Lottery Abuse ("AALA"), Committee to Preserve Lottery Selection ("Committee"), Crystal Communications Systems ("Crystal"), JMC Enterprises/SDK Enterprises/Donald J. Kunkle/Formula I Cellular ("JMC/SDK"), Moving Phones Partnership and FutureWave General Partnership, Price Communications Cellular Inc., RSA Applicants, and TME Cellular Partners.

must hold a lottery for the Ceiba and other RSA licenses. The Commission should reject this intentional twisting of the crystal clear language of the statute.

The Commission should also discount the overblown claims of grievous injury set forth by the Lottery Proponents. Under FCC and judicial precedent, these parties have no vested right to a certain licensing process. The funds they expended to prepare and submit their applications were nominal, and engineering studies can easily be applied to the auction and providing service to the public. Moreover, given the sheer number of applicants for these RSA authorizations (e.g., 491 for Ceiba alone), any party truly serious about operating a cellular system would stand a much better chance of obtaining a license at auction than through random selection.

If the Commission decides to hold an auction for these RSA licenses, it should reject the arguments of several of the Lottery Proponents that the pool of potential bidders must be restricted either to current applicants or to parties that have not been granted interim operating authority for the markets in question. The Commission's policy barring interim operators from applying for permanent licenses originated in the comparative hearing context as a way to ensure that decision-makers would not favor parties that had a proven record of service in that market. It has no relevance whatsoever to the auction process, in which licenses are simply awarded to the highest bidder. Similarly, the Lottery Proponents' contention that the Commission is precluded from dismissing the pending applications for these licenses and may not switch to an auction regime is unsupported by both law and policy.

Finally, the Commission should not accept the demands of two of the Lottery Proponents that CCPR be punished for alleged violations of the Commission's ex parte rules. Because CCPR did not make any presentation on the merits of the restricted application proceeding, its communications with Commission staff members did not violate the FCC's regulations. Rather, CCPR's presentations involved what were clearly non-restricted rulemaking issues. Moreover, even if CCPR could be deemed to have addressed the merits of the Ceiba application proceeding, requiring CCPR to serve 491 parties before it could draw the Commission's attention to the Wireless Telecommunications Bureau's ("Bureau's") lottery notice and advocate an auction would be absurd. As the Commission noted, in analogous situations, it simply makes the presentations available to the public through public notice procedures. That was done in this case, and the Lottery Proponents have had ample opportunity to air their views.

I. THE COMMISSION IS STATUTORILY EMPOWERED TO USE AUCTIONS TO LICENSE ALL CELLULAR MARKETS

The Commission has broad statutory authority to use auctions to license cellular RSAs. This is evident by both the plain meaning and legislative history of Section 309(j).^{3/} Any suggestion that Section 6002 of the Budget Act of 1993, which created Section 309(j), requires the Commission to use lotteries for applications filed prior to July 26, 1993 egregiously misinterprets that portion of the statute and should be disregarded.^{4/} While the

^{3/} 47 U.S.C. 309(j).

^{4/} See Omnibus Budget Reconciliation Act of 1993, Pub.L. 103-66, Title VI, § 6002, adding new Section 309(j) to the Communications Act of 1934, 107 Stat. 387 ("Budget Act"); see also § 6002(e)(2), permitting the Commission to use lotteries for license applications filed before July 26, 1993, 107 Stat. 397.

Commission licensed cellular RSAs through lotteries prior to the enactment of the Budget Act, the Commission's decision to switch to from lotteries to auctions does not constitute impermissible retroactive rulemaking.

A. Both the Plain Meaning and Legislative History of Section 309(j) Indicate That the Commission has Broad Statutory Authority To Use Auctions To License Cellular RSAs.

The Commission has complete discretion to issue all cellular licenses through competitive bidding, even those for which applications are currently on file. In the Budget Act, Congress mandated competitive bidding if a service meets the standards for auctionability under Section 309(j)(2).^{5/} Section 6002(e) of the Budget Act, entitled "Special Rule," made an exception to the general auction requirement, providing that the Commission may continue to employ lotteries if applications for a license were filed prior to July 26, 1993.

Given this abundantly clear language, it is not apparent from what source the Lottery Proponents derive their argument that the Commission lacks the requisite statutory authority to switch to an auction regime for these RSA authorizations.^{6/} The Special Rule in no way limits the method by which the Commission may issue the licenses. Rather, that provision simply indicates that the Commission may employ a lottery even for an otherwise auctionable service for certain previously filed applications. Contrary to the Lottery Proponents'

^{5/} 47 U.S.C. 309(j)(2).

^{6/} For example, AALA suggests that Section 6002(e)(2) precludes the Commission from auctioning cellular licenses in this proceeding. AALA Comments at 4-5. Committee similarly contends that the Special Rule "instructs the Commission not to use auctions to award licenses if the applications were filed on or before July 26, 1993." Committee Comments at 2.

linguistic sophistry, "permitting" the Commission to conduct a lottery does not amount to "mandating" it to do so. If anything, the option to hold a lottery afforded by Section 6002(e)(2) makes it even more clear that Congress intended the Commission to have unfettered discretion in selecting the means by which to distribute cellular licenses.

The legislative history of Section 309(j) further indicates that Congress intended the Commission to have broad statutory authority to use auctions as a means of licensing these cellular RSAs. For example, while the Senate Amendment to the Budget Act stated that "competitive bidding should apply only to the granting of new spectrum licenses and should not ... alter existing spectrum allocation procedures,"^{7/} this language was specifically excluded from the final draft of the legislation. This indicates that Congress considered and rejected a ban on auctions for licenses with pending applications. Moreover, this same Senate Amendment, improperly cited by AALA as suggesting a Congressional preference for lotteries, extolled the virtues of spectrum auctions and specifically delineated the shortcomings of lotteries.^{8/} Despite the Lottery Proponents' attempts to twist beyond recognition the plain language of the statute and to interpret the legislative history in a manner that suits their needs, the crystal clear intention of Congress is obvious.

^{7/} 139 CONG. REC. S7995, 103d Cong., (daily ed. June 24, 1993).

^{8/} Id. ("The Congress finds that ... (8) current spectrum assignment procedures -- comparative hearings and lotteries -- can be expensive and time consuming, can strain the limited resources of the [FCC], and can result in an inefficient distribution of spectrum and an unjustified windfall to speculators; (9) competitive bidding could ... increase the efficiency of the spectrum assignment process for certain radio services, discourage speculative applications, encourage the efficient use of spectrum by licensees, and fairly compensate United States taxpayers for the use of a scarce public natural resource.")

B. A Commission Decision To Switch From Lotteries to Auctions Does Not Constitute Retroactive Rulemaking.

The Commission has consistently held that it has the authority to change the procedural rules for granting radio authorizations, and has made such changes where it has determined that the public interest so requires.^{9/} For example, in its 1984 Cellular Lottery Order,^{10/} the Commission stated that it could replace comparative hearings with the lottery process, even though applications for cellular licenses had already been accepted. In so doing, the Commission rejected the arguments of applicants that changing from comparative hearings to lotteries amounted to retroactive rulemaking.^{11/} There is simply no inherent right to any particular licensing process, even after applications have been submitted.

The U.S. Court of Appeals for the D.C. Circuit upheld the Commission's substitution of lotteries for comparative hearings.^{12/} The court held that pending applicants have no legal

^{9/} See Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in 2.1 and 2.5 GHz Bands, 8 FCC Rcd 1444, 1447 (1993) ("It is well-settled that the rules applicable to previously-filed applications may be amended.") citing United States v. Storer Broadcasting Co., 251 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989); see also Review of Pioneer's Preference Rules, Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 4523, 4530 (1995) ("Pioneer's Preference Order") (indicating that modifications made to the pioneer's preference rule do not constitute retroactive rulemaking even if they affect existing applicants who must now pay for a license they expected to get for free if selected).

^{10/} Amendment of the Commissioner's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries instead of Comparative Hearings ("Cellular Lottery Order"), 98 FCC 2d 175 (1984); recon., 101 FCC 2d 577 (1985).

^{11/} Cellular Lottery Order, 98 FCC 2d at 182-184.

^{12/} Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

right to the same process that was in place when their applications were filed, and that any decision by the Commission to switch licensing methodology is statutorily justified.^{13/}

The same principle that permitted the Commission to switch from comparative hearings to lotteries applies in the context of moving from lotteries to auctions. Even when it decided to use lotteries to license unserved cellular areas, the Commission acknowledged that it had "the discretion to select licensees for the unserved area applications filed prior to July 26, 1993 by auction rather than by lottery."^{14/} The fact that the Commission chose lotteries for unlicensed areas does not prevent it from switching to auctions for entire RSAs.^{15/}

II. FAIRNESS AND PUBLIC INTEREST CONSIDERATIONS SUGGEST THAT THE COMMISSION SHOULD USE AUCTIONS TO LICENSE CELLULAR RSAs

The Lottery Proponents' alleged equitable considerations for continuing lotteries have even less basis than their legal arguments. As CCPR stated in its Petition, the public interest would be well served by a Commission decision to use auctions to license cellular RSAs. By placing licenses in the hands of parties that value them the most, auctions promote the rapid development and deployment of new technologies and maximize the likelihood that the spectrum will be used to its full potential. Moreover, there is no basis for the Lottery Proponents' claims that they will be harmed if the Commission does not employ lotteries.

^{13/} Id. at 1554-56.

^{14/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 7387, 7389 (1994) ("Unserved Areas Order") (emphasis added).

^{15/} Indeed, as CCPR pointed out in its Petition, there are a multitude of reasons why auctions are appropriate in this instance when they may not have been when the Commission considered the issue in the Unserved Areas Order. CCPR Petition at 3-6.

No inalienable right to the lottery process attached simply because the parties in this proceeding applied for cellular licenses eight years ago. If anything, the selection of auctions over lotteries would be more equitable because parties that are serious about providing cellular service would have a better chance of obtaining a license.

A. Auctions are Superior to Lotteries in Many Ways.

When Congress authorized competitive bidding as a means to distribute wireless licenses, it explicitly found that auctions can promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."^{16/} In addition, Congress determined that auctions can encourage efficiency and generate funds for the public welfare.^{17/}

In contrast, after years of experience with lotteries, Congress recognized that they "engendered rampant speculation; undermined the integrity of the FCC's licensing process, and, more importantly, frequently resulted in unqualified persons winning an FCC license."^{18/} While applicants who are prepared to bid at auction are more certain to construct their facilities and commence operations in an effort to recover bidding costs, many lottery applicants never have any intention to build or operate a system. Rather, lottery history has shown that many participants seek to acquire licenses at nominal cost in order to recoup huge profits through trafficking in spectrum authorizations. There is absolutely no

^{16/} 47 U.S.C. 309(j)(2)(B) and 309(j)(3)(A).

^{17/} 47 U.S.C. 309(j)(2)(B) and 39(j)(3)(C)-(D).

^{18/} H.R. Rep. No. 103-111, 103d Cong., 1st Sess. (1993) at 248 ("Budget House Report").

reason to continue using a system that enriches speculators and deprives the public of the opportunity to recover a portion of the value of the spectrum.^{19/}

While some of the Lottery Proponents refer to the Commission's decision to lottery certain MDS licenses as support for their claim that licenses should not be auctioned in this instance, that proceeding is easily distinguishable from the facts in this case. In its MDS Order, the Commission indicated that the five licenses applied for by approximately 100 applicants prior to July 26, 1993 should be lotteried in part because of their "expected low commercial value."^{20/} Indeed, the Commission stated that the "administrative costs associated with conducting an auction for the approximately 100 previously filed applications would not be justified" in the MDS case.^{21/} In contrast, the cellular RSA authorizations in this proceeding are extremely valuable and would likely serve as a tremendous source of revenue. The cost associated with holding auctions for these licenses would therefore be

^{19/} See 47 U.S.C. § 309(j)(3). While Section 309(j)(7)(A) specifically prohibits the Commission from employing auctions based on revenue considerations alone, it is clear that this benefit is only one of the many reasons why auctions are superior to lotteries.

^{20/} Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act-Competitive Bidding, 10 FCC Rcd 9589, 9632 (1995). The Commission further stated:

[F]or various reasons unique to MDS we anticipate that the BTA service areas will be auctioned for relatively modest amounts under our prospective licensing regime. It seems reasonable to assume that the small number of rural, site-specific MDS conditional station licenses at issue here would draw even less money at auction than the relatively modest amounts we anticipate for the larger geographic areas that will be auctioned in the future.

Id. at n.62.

^{21/} Id. at 3632.

negligible relative to the income they would generate. Given this discrepancy, the Commission's decision to lottery five MDS licenses is not relevant here.

B. The Lottery Proponents Have Not Presented an Equitable Basis for Giving Away the Cellular Licenses.

The Lottery Proponents claim that they will suffer grievous injury if they are not given the opportunity to have their names drawn out of a hat. They argue that because they expended funds in preparing and submitting applications, they have a right to a re-lottery.^{22/} There is no merit to this position.

The Commission has previously held that pending applicants have no legitimate expectation that they will in fact receive a license for which they have applied. For example, in the pioneer's preference proceeding, the Commission determined that applicants who applied for preferences would have to participate in auctions if they wished to obtain licenses, even if their requests had been made long before competitive bidding was authorized.^{23/} In so holding, the Commission stated that because "none of the parties had been awarded even a tentative preference, no party can claim that it had received the expectation of an award under the existing pioneer's preference rules and that it therefore had reason to believe that changes in these rules would not apply to them."^{24/}

Similarly, in deciding to employ lotteries instead of comparative hearings for cellular licenses, the Commission rejected the arguments of existing applicants that the agency was required to retain the existing procedures. The Commission noted that "[t]he claims of

^{22/} See AALA Comments at 6; JMC/SDK Comments at 6.

^{23/} Pioneer's Preference Order, 10 FCC Rcd at 4530.

^{24/} Id.

unfairness serve only to obscure the underlying point: those who spent great sums in the hope that they would win the comparative hearing have no vested right in the process itself, but rather only an expectation.^{25/}

The Commission's decisions in the pioneer's preference and cellular lottery proceedings are equally applicable here. The mere act of submitting an application does not vest the filer with an equitable claim to the process in place at that time. Contrary to the assertions of the Lottery Proponents, the six RSA licenses are not yet "their licenses" and to the extent some of these parties may have relied on the continuation of the lottery process, it was woefully misplaced.^{26/} In any event, it is not clear exactly how the lottery applicants have relied on the lottery process. The funds they spent to prepare and submit an application were minimal and any engineering studies commissioned could be used for the auction and in providing service to the public. While not explicitly stated, the Lottery Proponents suggest that they have actually based their future business plans on the chance that they would win the lottery. Given the randomness of the lottery process, such reliance is, at best, misguided.

The absurdity of the Lottery Proponents' equitable arguments are highlighted by the fact that the Commission received hundreds of applications for each of the subject RSAs. Indeed, a re-lottery would provide each Ceiba applicant with only a 1 in 491 chance of winning the cellular license. An auction, on the other hand, would provide those parties that

^{25/} Cellular Lottery Order, 98 FCC 2d at 189.

^{26/} See AALA Comments at 7 (stating that applicants could not have "anticipated that their licenses might someday be subject to competitive bidding").

are truly serious about providing cellular service -- rather than merely gambling at the expense of the U.S. taxpayers -- with a legitimate shot at obtaining a license. The Commission should not be swayed by these baseless claims of imminent injury.^{27/}

III. CELLULAR RSA AUCTIONS SHOULD BE OPEN TO ALL PARTIES.

In an attempt to make auctions appear less enticing to the Commission, the Lottery Proponents advance arguments for limiting the pool of potential bidders. For example, several commenters argue that holders of interim operating authority ("interim operators"), such as CCPR, must be barred from participating in an auction for these cellular RSAs. Similarly, some parties contend that the Commission must accept the existing pool of applicants with no additions or modifications.

The commenters advocating the exclusion of interim operators conveniently ignore the fact that this policy originated in the comparative hearing context and has absolutely no relevance when licenses are distributed via competitive bidding.^{28/} Before lotteries and auctions, administrative law judges and the Commission were required to choose among mutually exclusive applicants on the basis of a number of subjective factors. In this context, the Commission rightfully was concerned that ordinary human decision-makers would be influenced by the fact that interim operators had invested money constructing facilities and

^{27/} The Commission should ignore Crystal's veiled threats of lawsuits if it does not get what it desires. Crystal Comments at 3. Many of the wireless licenses previously auctioned by the Commission were subject to pending litigation and that circumstance did not appear to depress the value of the authorizations whatsoever.

^{28/} See Community Broadcasting Co., Inc. v. FCC, 274 F.2d 753, 758-59 (D.C. Cir. 1960) (discussing the difficulties faced by competing applicants in comparative hearings when an interim service provider is among the contenders); Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 589-91 (D.C. Cir. 1968).

had experience in serving the public that the other applicants lacked.^{29/} In response to this dilemma, the Commission and the courts crafted a policy prohibiting interim operators from competing for permanent licenses.

While the policy of preventing interim operators from obtaining permanent licenses made sense in the comparative hearing context, this practice cannot logically be extended to competitive bidding. In auctions, the Commission does not choose among competing applicants based on their relative merits; licenses are simply awarded to the highest bidder. The suggestion that CCPR and other interim carriers will somehow obtain an advantage if auctions for cellular licenses are implemented makes no sense whatsoever.

While the Lottery Proponents state that Commission policy precludes interim service providers, such as CCPR, from participating in auctions, they fail to cite to any precedent to back up this assertion. Indeed, the seminal case referred to by these parties, La Star Cellular Telephone Co. v. New Orleans CGSA, Inc., occurred in the comparative hearing context.^{30/} Moreover, in that case, the Commission chose to award interim authority to a carrier that remained eligible to become a permanent licensee.

Recognizing that the original rationale for barring interim operator applicants is not relevant in the auction context, the Lottery Proponents attempt to develop new rationales for extending the policy to this situation. For example, AALA claims that interim carriers

^{29/} See Community Broadcasting Co., Inc. 274 F.2d at 759 ("Ordinary human experience tells us that these factors have a force which cannot always be set aside by the tiers no matter how sincere their effort or intent.")

^{30/} La Star Cellular Telephone Co. v. New Orleans CGSA, Inc., 4 FCC Rcd 3777, 3779 (1989), aff'd, 7899 F.2d 1233 (D.C. Cir. 1990).

should be prevented from participating in auctions because "the market would have a higher value to [them] than to any other business".^{31/} Although interim carriers might be willing to spend considerable sums to obtain permanent licenses at auction, it is just as conceivable that other operators will be willing to pay equivalent amounts given the fact that the existing interim facilities could be purchased at market prices. Moreover, contrary to AALA's assertion, CCPR's interim operating authority cannot possibly arm it with clairvoyance in assessing the true value of a cellular license. And, even if that were the case, it provides no basis for excluding CCPR from the auction. Indeed, under this theory, the Commission would have to preclude current cellular and PCS licensees from bidding on in-market PCS authorizations because they might possess superior knowledge about the customer base. For good reason the Commission has not taken this approach. Acceptance of these feeble post hoc rationales would result in decreased auction competition and the unnecessary exclusion of viable and willing operators.

Nor is the Commission consigned to accepting only existing applicants for a cellular RSA license auction. Contrary to the suggestion of RSA Applicants and others, McElroy Electronic Corp. v. FCC^{32/} does not preclude the dismissal of the lottery applications and the establishment of an application deadline if the Commission decides to hold an auction. McElroy involved a situation in which the Commission closed a filing window for a lottery and thereafter accepted more applicants for the same lottery. As noted above, none of the existing applicants in this proceeding had a reasonable expectation that the licensing

^{31/} AALA Comments at 14-15.

^{32/} 86 F.3d 248 (D.C. Cir. 1996).

procedures for these cellular RSAs would remain the same. Thus, to the extent the Commission decides to switch to competitive bidding, the applicants cannot reasonably argue that they expected only to compete in an auction against the same pool of bidders. This is especially the case considering that each of these parties has already participated in a lottery for the given RSA and the Commission could easily have dismissed their applications the day after the original drawing. Finally, from a policy standpoint, it would make no sense to hold an auction with only lottery applicants as potential bidders. Auctions are intended to put licenses in the hands of the entities that value them the most, and it is clear that the vast majority of the existing applicants do not value these authorizations enough to even pay market value. Rather, as is evident from the Lottery Proponents' pleadings, these parties applied with the hope that they would get something for nothing.

The Commission should hold a prompt and fair auction for these RSA authorizations, open to all bidders willing to submit a "short-form" application and an upfront payment. Despite the arguments of the Lottery Proponents, there is no legal or policy basis for limiting the applicant pool to existing applicants or parties without interim operating authority.

IV. CCPR DID NOT VIOLATE THE EX PARTE RULES

AALA and Crystal, in substantially similar pleadings, argue that CCPR violated the Commission's ex parte rules by communicating its views on the use of auctions versus lotteries for the Ceiba RSA to Commission staff members.^{33/} Because CCPR's presentations did not address the merits of the Ceiba, or any other, application proceeding, these contentions are wholly without merit and should be dismissed without further consideration.

^{33/} AALA Comments at 15-17; Crystal Comments at 10-12.

Section 1.1202(a) of the Commission's rules prohibits only ex parte presentations that are "directed to the merits or outcome" of a restricted proceeding.^{34/} In the case of mutually exclusive and contested application proceedings, the Commission has consistently distinguished between communications regarding the merits of the applications themselves and general communications on rulemaking issues that might conceivably affect the disposition of the applications. For example, in the context of pioneer's preference requests, the Commission initiated a proceeding regarding whether the pioneer's preference rules should be retained or amended and proposed to apply any repeal or amendment to pending preference applications.^{35/} While the resolution of the substantive issues raised in that proceeding would have a profound impact on existing applicants, the Commission declared the rulemaking non-restricted and permitted presentations without service on other parties. At the same time, the Commission ruled that no ex parte presentations would be allowed with regard to the individual preference requests that had been formally opposed.^{36/}

Similarly, when it initially proposed adoption of the pioneer's preference rules, the Commission stated that it would treat a request for a pioneer's preference and a related petition for rulemaking for allocation of spectrum as separate proceedings because the former would be considered restricted under the ex parte rules while the latter would be exempt.^{37/}

^{34/} 47 C.F.R. § 1.1202(a).

^{35/} Review of Pioneer's Preference Rules, Notice of Proposed Rulemaking, 8 FCC Rcd 7692, 7695 (1993).

^{36/} Id.

^{37/} Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order, 6 FCC Rcd 3488, 3493 (1991).

The Commission further asserted that a formal opposition in the restricted proceeding would only prohibit presentations in the exempt proceeding to the extent they concerned "who should or should not receive a pioneer's preference or experimental license."^{38/}

As was the case in the pioneer's preference proceeding, CCPR's communications to FCC staff members had nothing to do with the merits of the pending applications for the Ceiba RSA license. CCPR did not opine on the relative merits of the applicants or on which party should or should not be granted a license. Rather, CCPR made presentations on the procedures that it believed should be used for distributing the Ceiba license. While AALA is correct that "a decision in favor of auctions would surely alter the outcome of this proceeding,"^{39/} that does not render CCPR's communications prohibited presentations.

In inviting public comment on CCPR's Petition, the Commission confirmed that the issues raised by CCPR were not adjudicative in nature. Indeed, as it had in the pioneer's preference context, the Commission specifically provided that "[t]his rulemaking proceeding (RM-8897) will be treated as a non-restricted proceeding for purposes of the Commission's ex parte rules," while the pending application proceedings will remain restricted.^{40/} Moreover, contrary to Crystal's assertion, the Commission did not find that CCPR had violated the ex parte rules.^{41/} Rather, the Commission simply stated that "CCPR's petition

^{38/} Id. at n.9.

^{39/} AALA Comments at 16.

^{40/} Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used To License Certain Cellular Rural Service Areas, Public Notice, DC 96-1685, (rel. Oct. 24, 1996) ("Public Notice") at 2.

^{41/} Cf. Crystal Comments at 12.

is deemed an impermissible ex parte presentation to the extent that it relates to the restricted application proceeding for RSA No. 727A, in Ceiba, Puerto Rico."^{42/} Because neither CCPR's Petition nor its previous communications relate to the Ceiba application proceeding, CCPR's presentations were completely lawful.

Even if CCPR's presentations were deemed to address the merits of the Ceiba applications, a finding that CCPR was not permitted to draw the Commission's attention to the Bureau's Lottery Notice and advocate an auction in its place without first serving 491 parties would be ludicrous. As the Commission stated, in situations in which "it is not feasible for parties to serve the often numerous mutually exclusive applicants," its policy is to identify documents provided in a public notice and make them available to the public.^{43/} That is exactly what the Commission did in this case.

AALA's and Crystal's calls for extreme sanctions against CCPR border on the frivolous. Because the rulemaking aspect of this proceeding was not docketed at the time of CCPR's presentation, it is not clear that CCPR had any obligation whatsoever to file ex parte notices regarding its communications with FCC staff members. Nevertheless, out of an abundance of caution, CCPR disclosed its contacts and made available the written materials provided to the Commissioners' offices. To put things in perspective, however, if there was any violation of the ex parte rules by CCPR, it was simply a failure to serve the 491 applicants with these materials (about which the public was alerted). Both AALA and Crystal apparently learned of these filings through the Commission's regular public notices.

^{42/} Public Notice at 2 (emphasis supplied).

^{43/} Id.

In addition, AALA, Crystal, and any other interested party, have had ample opportunity to comment on the merits of CCPR's Petition and to make presentations of their own prior to any Commission action on whether auctions or lotteries should be employed.

AALA's and Crystal's contention that the Commission's postponement of the lottery in order to consider CCPR's Petition requires sanctioning of CCPR is so meritless that it deserves no response. These parties' real gripe is that CCPR frustrated their expectation that the Bureau's Lottery Notice would slip by with no challenge and that they would each enjoy their one in 500 chance of becoming very rich with nominal capital investment. Despite this disappointment, the Commission should not condone AALA's and Crystal's efforts to impugn the ethics of other parties or the Commission's processes in this proceeding. AALA's and Crystal's hyperbolic claims of ex parte violations should be rejected forthwith and the Commission should consider CCPR's Petition without further delay.

CONCLUSION

For the foregoing reasons, the Commission should hold an auction to license cellular RSA No. 727A, Ceiba, Puerto Rico, and the other RSAs referenced in the Public Notice.

Respectfully submitted,

Cellular Communications of Puerto Rico, Inc.

A handwritten signature in cursive script, appearing to read "Yaron Dori", written over a horizontal line.

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December 10, 1996

CERTIFICATE OF SERVICE

I, Tanya Butler, hereby certify that on this 10th day of December, 1996 a copy of the foregoing "Reply Comments of Cellular Communications of Puerto Rico" was served by first class mail, postage prepaid or messenger(*) on the following:

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